



DEPARTMENT OF TRANSPORTATION
MATERIALS TRANSPORTATION BUREAU
WASHINGTON, D.C. 20590

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Title 49—Transportation
SUBTITLE B—OTHER REGULATIONS RELATING
TO TRANSPORTATION

CHAPTER I—MATERIALS TRANSPORTATION
BUREAU, DEPARTMENT OF
TRANSPORTATION

[Docket HJM-138; Amdt. No. 107-3]

PART 107—PROCEDURES

Preemption and Enforcement Procedures

The purpose of these amendments to 49 CFR Part 107 is to (1) establish procedural regulations that implement the preemption provisions of section 112 of the Hazardous Materials Transportation Act (Title I of Pub. L. 93-633), (2) prescribe procedures to be followed by the Materials Transportation Bureau (MTB) in carrying out its enforcement responsibilities under sections 109, 110, and 111 of the same Act, and (3) add several general procedural provisions covering the MTB's hazardous materials public docket room, service of documents and subpoenas.

AMENDMENTS TO GENERAL PROVISIONS

The list of definitions in § 107.3 is expanded to include a definition of "person" which covers all of the commonly recognized classes of legal entities regularly doing business, as well as individuals. A definition of "respondent" is added for use in connection with the new Subpart D enforcement procedures. A definition of "State" is being incorporated verbatim from section 103(5) of the Hazardous Materials Transportation Act.

A new § 107.9 is added setting forth a general description of the materials available for public inspection and copying in the MTB's hazardous materials public docket room.

A new § 107.11 prescribes the means for effecting service of documents for purposes of the various hazardous material procedural regulations.

A new § 107.13 specifies who has authority to issue subpoenas under section 109(a) of the Hazardous Materials Transportation Act and prescribes the procedures for their issuance and service, the payment of witness fees, the handling of motions to quash or modify, and their enforcement.

PREEMPTION

In enacting section 112 of the Hazardous Materials Transportation Act, the Congress endorsed the principle of Federal preemption in order to preclude a multiplicity of State and local regulations and the potential for varying, as well as conflicting, regulations in the area of hazardous materials transportation (S. Rep. No. 93-1193, 93rd Cong., 2d Sess. 37 (1974)). The pertinent provisions of section 112 read as follows:

Sec. 112. (a) *General*.—Except as provided in subsection (b) of this section, any requirement of a State or political subdivision thereof, which is inconsistent with any re-

quirement set forth in this title, or in a regulation issued under this title, is preempted.

(b) *State Laws*.—Any requirement of a State or political subdivision thereof, which is not consistent with any requirement set forth in this title, or in a regulation issued under this title, is not preempted if, upon the application of an appropriate State agency, the Secretary determines, in accordance with procedures to be prescribed by regulation, that such requirement (1) affords an equal or greater level of protection to the public than is afforded by the requirements of this title or of regulations issued under this title and (2) does not unreasonably burden commerce. Such requirement shall not be preempted to the extent specified in such determination by the Secretary for so long as such State or political subdivision thereof continues to administer and enforce effectively such requirement.

Section 112(a) operates to preempt and nullify requirements of States and their political subdivisions pertaining to the transportation of hazardous materials which are inconsistent with Federal requirements. The determination as to whether a State or local requirement is consistent or inconsistent with a Federal statute or Federal regulations is traditionally judicial in nature. It is to be expected that conflicts between State and local hazardous materials requirements and the Hazardous Materials Transportation Act and related regulations will be the subject of future litigation. The Bureau, however, does not see the courts as the exclusive arbitrators of the inconsistency questions that may be posed by § 112(a). Therefore, to facilitate the operation of section 112(a), procedures are established in new Subpart C providing States and their political subdivisions and persons affected by requirements of States or political subdivisions the opportunity to seek administrative rulings as to the consistency or inconsistency of any particular State or political subdivision requirement. Also established are the procedures required by section 112(b) by which States or political subdivisions may obtain formal determinations that their inconsistent requirements are not preempted.

The new Subpart C prescribes means for obtaining inconsistency rulings and preemption determinations with respect to existing hazardous materials requirements of States and political subdivisions of States. These procedures are not a vehicle for receiving pre-enactment approval by the MTB. The Bureau does not hold itself out as legislative drafting or editorial service nor will it provide legal research service for State or local governments or legislators. It will, however, upon application, review State and political subdivision requirements which have been officially adopted by a State or political subdivision.

In defining the term "political subdivision" used in section 112 of the Act, the Bureau has taken the view that it includes not only the agencies of a State

government, as well as municipalities and other local governments, but also entities created by one or more States or municipalities.

Section 107.203 invites applications for inconsistency rulings from States, political subdivisions, and persons affected by hazardous materials requirements of States and political subdivisions. It also specifies what each applicant must submit as part of his application. Section 107.205 requires private applicants to serve a copy of their application on the State or political subdivision concerned and gives the State or political subdivision 45 days in which to comment. Irrespective of who files an application, the Office of Hazardous Materials Operations (OHMO) may serve notice on additional parties or publish notice of the application in the *FEDERAL REGISTER* and invite interested persons to file written comments. Under § 107.207 the Director, OHMO, exercises broad investigative authority to fully develop the information necessary for his evaluation of the application. Section 107.209 reserves to the Director, OHMO, the authority to review and issue an inconsistency ruling on his own motion, invoking as necessary the same procedural mechanisms as are available in the case initiated by an application. Paragraph (c) of this section sets forth criteria employed by the Director, OHMO, in making his ruling. These criteria comport with the test for conflicts between Federal and State statutes enunciated by the Supreme Court in *Hines v. Davidowitz*, 312 U.S. 52 (1941). Each ruling is issued in writing and is served on the applicant and others who may be involved in the proceeding. When major issues are involved or the ruling has broad application, it may be published in the *FEDERAL REGISTER* in addition to being served on interested individuals.

Section 107.211 provides a 30-day appeal period for any person aggrieved by a particular ruling.

Section 107.215 invites States and political subdivisions (not private parties) to submit applications for non-preemption determinations. As specified in paragraph (b) of this section, each application must set forth the facts and the applicant's rationale and arguments in support of the non-preemption determination sought.

Section 107.217 requires a State or political subdivision applying for a preemption determination to serve notice of that application on those persons which the State or political subdivision can reasonably identify as being affected by the requested determination. The OHMO may add to the service list or publish notice in the *FEDERAL REGISTER*, or both. All persons upon whom notice is served or who are identified in the *FEDERAL REGISTER* notice will have the opportunity to submit written comments. Under § 107.219, as in the case of inconsistency

rulings, the Director, OHMO, has broad procedural authority to fully develop the necessary information for making his determination. This includes the authority to require supplemental submissions from the applicant. The Director may dismiss an application without prejudice if there is insufficient information to make his determination; if the applicant fails to provide requested additional information; or if the applicant fails to provide notice to affected persons. The Director will only consider a request for a preemption determination if the inconsistency of the State or political subdivision requirement in issue has been affirmatively fixed by the order of a court of competent jurisdiction by a § 107.209 administrative ruling that has become final, or through the express acknowledgement of inconsistency by the applicant. When the OHMO has received all of the information necessary for reaching a determination, all participants are so notified and, if a formal determination is not issued within 90 days, § 107.223 affords the applicant the same opportunity for appeal as in the case of a denial.

Section 107.221, which provides for the issuance of a written determination, specifies the principal factors considered by the Director, OHMO, in reaching that determination. Whether a particular inconsistent State or political subdivision requirement unreasonably burdens commerce is a question of fact and requires a balancing of the State's or political subdivision's interest in public health and safety against the national interest in maintaining a free flow of commerce. The factors listed in § 107.221(b), no single one of which is dispositive in determining whether a State or political subdivision requirement creates an unreasonable burden, provide in combination the test by which that determination is to be made. Such have been the factors employed by the Supreme Court in deciding whether various State transportation safety requirements impose an unreasonable burden on interstate commerce. See e.g. *South Carolina State Highway Department v. Barnwell*, 303 U.S. 171 (1938); *Southern Pacific v. Arizona*, 325 U.S. 761 (1945); *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959). Section 107.221 also provides for service of each preemption determination upon the applicant and other interested persons.

As in the case of inconsistency rulings, a 30-day appeal period for preemption determinations is provided by § 107.225. An appeal may be filed by any person aggrieved by a particular preemption determination.

ENFORCEMENT

New Subpart D describes the investigative procedures and enforcement authorities of the MTB with respect to its assigned area of responsibility for enforcement of the hazardous materials regulations. It also sets forth the MTB's procedures governing the imposition of sanctions with respect to violations of those regulations.

Section 107.301 describes the division of enforcement responsibilities among the operating elements of the Department of Transportation, including the MTB. The MTB exercises its hazardous

materials enforcement responsibility through the OHMO. As stated in § 107.303, Subpart D covers the OHMO segment of this enforcement responsibility. Section 107.305 describes the investigative procedures followed by OHMO inspectors.

Under separate headings the remainder of Subpart D describes the various enforcement sanctions available to the OHMO and with respect to those which are primarily administrative in nature (i.e., compliance orders and civil penalties) sets forth procedures governing the processing of individual actions. The choice of which enforcement action or combination of actions to be initiated in a given case is, of course, a matter of administrative discretion with the OHMO acting under the policy direction of the Director, MTB. The four types of enforcement sanctions available to the OHMO are compliance orders, injunctive actions, civil penalties, and criminal penalties.

Sections 107.307 through 107.321 set forth the procedures applicable to the issuance of compliance orders under section 109(a) of the Hazardous Materials Transportation Act. Sections 107.431 through 107.359 set forth the procedures applicable to civil penalties assessed under section 110(a) of the Hazardous Materials Transportation Act. In many respects of the compliance order and civil penalty procedures are similar. Both are initiated by the issuance of a notice of probable violation with the respondent having 30 days in which to reply. Both provide the respondent with an opportunity to present a rebuttal to the allegations, in writing or orally, or a combination of both. They also provide means for settlement through informal compromise. In addition, both provide the respondent with options as to the degree of formality with which the matter is to be processed.

After receiving a notice of probable violation indicating that the OHMO is considering issuance of a compliance order, the respondent may (1) elect not to contest the allegations, (2) proposed the negotiation of a consent order, or (3) contest the allegations. If a consent order cannot be worked out or the respondent contests the allegations, a hearing is held before an official who has the authority to dismiss the case or issue an order directing compliance. His order may be appealed within 20 days after service.

In a situation where an ongoing or impending violation poses a risk requiring corrective steps be taken for the protection of public health and safety without delay, an order directing immediate compliance can be issued under § 107.319. Although prior notice and opportunity for a hearing procedure do not apply in such a situation, the order is subject to administrative appeal.

Section 107.331 and 107.333 reflect generally the authority contained in section 111 (a) and (b), respectively, of the Hazardous Materials Transportation Act. These provisions provide for injunctive relief and punitive damages for violations of the hazardous materials regulations and for the enforcement of compliance orders. When time permits the Department of Justice will bring an action on

behalf of the MTB in the appropriate U.S. District Court. However, when a situation involves an imminent hazard, the Director, MTB, may bring the action on his own motion in the appropriate U.S. District Court.

When a respondent receives a notice of probable violation indicating that the Director, OHMO, is considering assessing a civil penalty, the respondent may, within 30 days of service, (1) pay the amount of the preliminary assessment, (2) make an informal response denying the allegations in whole or in part and offering explanatory information, or (3) request a hearing. The filing of an informal response provides the opportunity for informal conference and possible compromise of the case. If a hearing is requested it will be conducted before an OHMO official who may dismiss the case or issue an order assessing a civil penalty. His order may be appealed within 20 days after service. In any case in which a civil penalty is assessed, the factors listed in § 107.359 are considered.

At any time after the issuance of a notice of probable violation in a civil penalty case and before it is referred to the Department of Justice for collection, the civil penalty can be compromised and settled by payment of the amount agreed upon in compromise.

Section 107.371 reflects the criminal penalty provided for in section 110(b) of the Hazardous Materials Transportation Act. Section 107.373 describes generally the procedures followed by the OHMO and the MTB with respect to possible criminal violations.

Since these amendments relate to practices and procedures of the MTB and its Office of Hazardous Materials Operations, notice and public procedure thereon is not necessary. Because these amendments are intimately related to action being taken in Docket HM-134 appearing elsewhere in this edition of the *Federal Register*, these amendments are

being made effective concurrently with those in HM-134. However, because the MTB contemplates a review of the procedures established by these amendments after they have been in operations for at least six months and since it is desirous of public participation in that review, interested persons are invited to submit such comments as they may desire with respect to the new preemption and enforcement provisions of new Subparts C and D of 49 CFR Part 107 to the Docket Section, Materials Transportation Bureau, U.S. Department of Transportation, Trans Point Building, Washington, D.C. 20590. All comments received before the close of business on June 1, 1977, will be considered during the review, and will be available in the docket for examination, both before and after that date.

To be given particular attention during the review will be the civil penalty hearing procedures set forth in § 107.355 which the Bureau recognizes may be more formal and burdensome than necessary to fulfill the statutorily required "opportunity for hearing". Accordingly the Bureau is particularly desirous of receiving comments with respect to a specific subject.

In consideration of the foregoing, 49 CFR Part 107 is amended as follows:

1. The table of sections is amended by adding the following new section numbers and headings:

Subpart A—General Provisions

Sec.

- 107.9 Public docket room.
- 107.11 Service.
- 107.13 Subpoenas; witness fees.

Subpart C—Preemption

- 107.201 Purpose and scope.

INCONSISTENCY RULINGS

- 107.203 Application.
- 107.205 Notice.
- 107.207 Processing.
- 107.209 Ruling.
- 107.211 Appeal.

NON-PREEMPTION DETERMINATIONS

- 107.215 Application.
- 107.217 Notice.
- 107.219 Processing.
- 107.221 Determination and order.
- 107.223 Timeliness.
- 107.225 Appeal.

Subpart D—Enforcement

- 107.301 Responsibility for enforcement.
- 107.303 Purpose and scope.
- 107.305 Investigations.

COMPLIANCE ORDERS

- 107.307 Compliance orders generally.
- 107.309 Notice of probable violation.
- 107.311 Reply.
- 107.313 Consent order.
- 107.315 Hearing.
- 107.317 Presiding officer's decision.
- 107.319 Compliance order for immediate compliance.
- 107.321 Appeal.

INJUNCTIVE ACTION

- 107.331 Injunctions generally.
- 107.333 Imminent hazards.

CIVIL PENALTIES

- Sec.
- 107.341 Civil penalties generally.
- 107.343 Maximum penalties.
- 107.345 Notice of probable violation.
- 107.347 Reply.
- 107.349 Payment of penalty.
- 107.351 Informal response and assessment.
- 107.353 Request for hearing.
- 107.355 Hearing.
- 107.357 Presiding officer's decision.
- 107.359 Assessment considerations.
- 107.361 Appeal.

CRIMINAL PENALTIES

- 107.371 Criminal penalties generally.
- 107.373 Referral for prosecution.

2. The authority citation following the table of sections is revised to read as follows:

AUTHORITY: 18 U.S.C. 831-835; 46 U.S.C. 170(11); 49 U.S.C. 1421(c); 49 U.S.C. 1802, 1806, 1808-1811; 49 CFR 1.53(e)-(h).

3. 49 CFR 107.3 is amended by adding new definitions of "Act", "Person", "Respondent", and "State" and as amended reads as follows:

§ 107.3 Definitions.

As used in this part:

"Act" means the Hazardous Materials Transportation Act.

"OHMO" means the Office of Hazardous Materials Operations.

"MTB" means the Materials Transportation Bureau.

"Person" includes a corporation, company, association, firm, partnership, society, and joint stock company, joint

venture, sole proprietorship, as well as any officer, director, owner or duly authorized representative of any such unit or an individual.

"Respondent" means a person upon whom the OHMO has served a notice of probable violation.

"State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, or Guam.

4. Subpart A is amended by adding new §§ 107.9, 107.11, and 107.13 immediately following § 107.7 to read as follows:

§ 107.9 Public docket room.

There is established in the MTB offices at 2100 2nd Street, SW., Washington, D.C., a public docket room in which there is available for public inspection and copying:

(a) Copies of notices of proposed rulemaking issued by the OHMO or its predecessor agency, including advance notices, together with the comments received thereon during rulemaking proceedings, copies of any related FEDERAL REGISTER notices, final rules, petitions for reconsideration, and decisions issued in response to petitions for reconsideration;

(b) Applications for exemptions from the Department of Transportation's regulations governing the transportation of hazardous materials, including supporting data, memoranda of any informal meetings with applicants, related FEDERAL REGISTER notices, comments received thereon during the public comment period and copies of decisions issued granting or denying applications for exemptions;

(c) Applications for inconsistency rulings and nonpreemption determinations under Subpart C of this part, together with the comments received thereon, related documents filed with the MTB, copies of related FEDERAL REGISTER notices, and rulings, determinations and orders issued in response to those applications;

(d) Records of compliance order proceedings and copies of OHMO compliance orders;

(e) Appeals filed under this part and MTB decisions issued in response to those appeals; and

(f) Such other information pertaining to the MTB's hazardous materials program required by statute to be made available for public inspection and copying and any information which the MTB or OHMO determines should be made available to the public.

§ 107.11 Service.

(a) Each order, notice, or other document required to be served under this part shall be served personally or by registered or certified mail, except as otherwise provided.

(b) Service upon a person's duly authorized representative constitutes service upon that person.

(c) Service by registered or certified mail is complete upon mailing. An official United States Postal Service receipt from the registered or certified mailing constitutes prima facie evidence of service.

§ 107.13 Subpoenas; witness fees.

(a) The Director, MTB, the Assistant General Counsel for Materials Transportation Law, or the MTB official designated to preside over a hearing convened in accordance with this part, may sign and issue subpoenas either on his own initiative or, upon an adequate showing that the information sought will materially advance the proceeding, upon the request of any person participating in that proceeding.

(b) A subpoena may require the attendance of a witness, or the production of documentary or other tangible evidence in the possession or under the control of the person served, or both.

(c) A subpoena may be served personally by any person who is not an interested person and is not less than 18 years of age, or by certified or registered mail.

(d) Service of a subpoena upon the person named therein shall be made by delivering a copy of the subpoena to such person and by tendering the fees for one day's attendance and mileage as specified by paragraph (f) of this section. When a subpoena is issued at the instance of any officer or agency of the United States, fees and mileage need not be tendered at the time of service. Delivery of a copy of a subpoena and tender of the fees to a natural person may be made by handing them to the person, leaving them at his office with the person in charge thereof, leaving them at his dwelling place or usual place of abode with some person

of suitable age and discretion then residing therein, by mailing them by registered or certified mail to him at his last known address, or by any method whereby actual notice is given to him and the fees are made available prior to the return date. When the person to be served is not a natural person, delivery of a copy of the subpoena and tender of the fees may be effected by handing them to a registered agent for service, or to any officer, director, or agent in charge of any office of the person, or by mailing them by registered or certified mail to that representative at his last known address or by any method whereby actual notice is given to the representative and the fees are made available prior to the return date.

(e) The original subpoena bearing a certificate of service shall be filed with the MTB official having responsibility for the proceeding in connection with which the subpoena was issued.

(f) A witness subpoenaed by the MTB shall be paid the same fees and mileage as would be paid to a witness in a proceeding in the district courts of the United States. The witness fees and mileage shall be paid by the person at whose instance the subpoena was issued.

(g) Notwithstanding the provisions of paragraph (f) of this section, and upon request, the witness fees and mileage may be paid by the MTB if the MTB official who issued the subpoena determines on the basis of good cause shown, that:

(1) The presence of the subpoenaed witness will materially advance the proceeding; and

(2) The person at whose instance the subpoena was issued would suffer a serious hardship if required to pay the witness fees and mileage.

(h) Any person to whom a subpoena is directed may, prior to the time specified therein for compliance, but in no event more than 10 days after the date of service of such subpoena, apply to the designated MTB official who issued the subpoena, or if he is unavailable, to the Director, MTB, to quash or modify the subpoena. The application shall contain a brief statement of the reasons relied upon in support of the action sought therein. The Director, MTB, or the designated MTB official, as the case may be, may:

- (1) Deny the application;
- (2) Quash or modify the subpoena; or
- (3) Condition denial of the application to quash or modify the subpoena upon the satisfaction of certain just and reasonable requirements. The denial may be summary.

(i) If there is a refusal to obey a subpoena served upon any person under the provisions of this section, the MTB may request the Attorney General to seek the aid of the United States District Court for any District in which the person is found to compel that person, after notice, to appear and give testimony, or to appear and produce the subpoenaed documents before the MTB, or both.

5. New Subparts C and D are added immediately following Appendix B to Subpart B to read as follows:

Subpart C—Preemption

§ 107.201 Purpose and scope.

(a) This subpart prescribes procedures by which (1) a State or a political subdivision of a State having a requirement pertaining to the transportation of hazardous materials or any person affected by the requirement may obtain an administrative ruling as to whether the requirement is inconsistent with the Act or regulations issued under the Act, and (2) a State or a political subdivision of a State may obtain a determination as to whether a requirement of that State or political subdivision, which is inconsistent with the Act or regulations issued under the Act and therefore preempted by section 112(a) of the Act is not so preempted.

(b) For purposes of this subpart "political subdivision" includes a municipality; a public agency or other instrumentality of one or more States, municipalities, or other political subdivisions of a State; or a public corporation, board, or commission established under the laws of one or more States.

(c) For purposes of this subpart regulations issued under the Act means the regulations contained in this subchapter, Subchapter C of this chapter and 46 CFR Part 146.

(d) Unless otherwise ordered by the Director, OHMO, an application for an inconsistency ruling which includes an application for a determination that the requirement is not preempted will be treated and processed solely as an application for an inconsistency ruling.

INCONSISTENCY RULINGS

§ 107.203 Application.

(a) Any State or political subdivision or any person affected by a requirement of a State or political subdivision may apply to the OHMO for an administrative ruling as to whether a particular

existing requirement of the State or political subdivision concerned is inconsistent with a requirement of the Act or the regulations issued under the Act.

(b) Each application filed under this section for a ruling must:

(1) Be submitted to the Office of Hazardous Materials Operations, U.S. Department of Transportation, Washington, D.C. 20590. Attention: Hazardous Materials Preemption Docket;

(2) Set forth the text of the State or political subdivision requirement for which the determination is being sought;

(3) Specify each requirement of the Act or the regulations issued under the Act with which the applicant seeks the State or political subdivision requirement to be compared for consistency; and

(4) State why the applicant believes the State or political subdivision requirement to be consistent or inconsistent with the requirements of the Act or the regulations issued under the Act.

(c) The filing of an application for a ruling under this section does not constitute grounds for noncompliance with any requirement of the Act or a regulation issued under the Act.

§ 107.205 Notice.

(a) If the applicant is other than a State or political subdivision, the applicant shall mail a copy of the application to the State or political subdivision concerned accompanied by a statement that the State or political subdivision may submit comments regarding the application to the OHMO within 45 days. The application filed with the OHMO must include a certification that the applicant has complied with this paragraph and must include the names and addresses of each State or political subdivision official to whom a copy of the application was sent.

(b) The OHMO may be serving notice on any other persons readily identifiable by the OHMO as persons who will be affected by the ruling sought or by publication in the FEDERAL REGISTER afford those persons an opportunity to file written comments on the application.

(c) Each person submitting written comments to the OHMO with respect to an application filed under this section shall send a copy of the comments to the applicant and certify to the OHMO that he has complied with this requirement. The OHMO may notify other persons participating in the proceeding of the comments and provide an opportunity for those other persons to respond.

§ 107.207 Processing.

(a) The Director, OHMO, may initiate an investigation of any statement in an application and utilize in his evaluation any relevant facts obtained by that investigation. The Director, OHMO, may solicit and accept submissions from third persons relevant to an application and will provide the applicant an opportunity to respond to all third person submissions. In evaluating an application, the Director, OHMO, may consider any other source of information. The Director, OHMO, on his own initiative may convene a hearing or conference, if he considers that a hearing or conference will advance his evaluation of the application.

(b) The Director, OHMO, may dismiss the application without prejudice if:

(1) He determines that there is insufficient information upon which to base a ruling; or

(2) He requests additional information from the applicant and it is not submitted.

§ 107.209 Ruling.

(a) Upon consideration of the application and other relevant information received or obtained during the proceeding, the Director, OHMO, issue his ruling.

(b) Notwithstanding that application for a ruling has not been filed under § 107.203, the Director, OHMO, on his own initiative, may issue a ruling as to whether a particular State or political subdivision requirement is inconsistent with the Act or the regulations issued under the Act.

(c) In determining whether a State or political subdivision requirement is inconsistent with the Act or the regulations issued under the Act, the Director, OHMO, considers:

(1) Whether compliance with both the State or political subdivision requirement and the Act or the regulations issued under the Act is possible; and

(2) The extent to which the State or political subdivision requirement is an obstacle to the accomplishment and execution of the Act and the regulations issued under the Act.

(d) The ruling includes a written statement setting forth the relevant facts and the legal basis for the ruling and provides that any person aggrieved thereby may file an appeal with the Director, MTB.

(e) The OHMO serves a copy of the ruling upon the applicant, any other person who participated in the proceeding and upon any other person readily identifiable by the OHMO as one who is affected by the ruling. A copy of each ruling is placed on file in the public docket. The OHMO may publish the ruling or notice of the ruling in the FEDERAL REGISTER.

(f) A ruling issued under this section constitutes an administrative determination as to whether a particular requirement of a State or local subdivision is inconsistent with the Act or the regulations issued under the Act. The fact that a ruling has not been issued under this section with respect to a particular requirement of a State or political subdivision carries no implication as to the consistency or inconsistency of that requirement with the Act or any regulations issued under the Act.

§ 107.211 Appeal.

Any person aggrieved by a ruling issued under § 107.209 may file an appeal with the Director, MTB. The appeal must be filed within 30 days of service of the ruling. There has not been an exhaustion of administrative remedies until an appeal has been filed and the appellate process is completed by the issuance of an order by the Director, MTB, granting or denying the appeal.

NON-PREEMPTION DETERMINATIONS

§ 107.215 Application.

(a) Any State or political subdivision may apply to the OHMO for a determination that a particular existing requirement of that State or political subdivision which is inconsistent with the Act or the regulations issued under the Act is not preempted.

(b) Each application filed under this section for a nonpreemption determination must:

(1) Be submitted to the Office of Hazardous Materials Operations, U.S. Department of Transportation, Washington, D.C. 20590. Attention: Hazardous Materials Preemption Docket;

(2) Set forth the text of the State or political subdivision requirement for which the determination is being sought;

(3) Include a copy of any court order and any ruling issued under § 107.209 having a bearing on the application;

(4) Contain an express acknowledgment by the applicant that the State or political subdivision requirement is inconsistent with one or more requirements of the Act or the regulations issued under the Act, unless it has been so determined by a court of competent jurisdiction or in a ruling issued under § 107.209;

(5) Specify each requirement of the Act or the regulations issued under the Act with which the State or political subdivision requirement is acknowledged or has been determined to be inconsistent;

(6) State why the applicant believes the State or political subdivision requirement affords an equal or greater level of protection to the public than is afforded the requirements of the Act or the regulations issued under the Act;

(7) State why the applicant believes the State or political subdivision requirement does not unreasonably burden commerce; and

(8) Specify what steps the State or political subdivision is taking to administer and enforce effectively its inconsistent requirement.

§ 107.217 Notice.

(a) The applicant State or political subdivision shall mail a copy of the application and any subsequent amendments or other documents relating to the application to each person who is reasonably ascertainable by the applicant as a person who will be affected by the determination sought. The copy of the application must be accompanied by a statement that the person may submit comments regarding the application to the OHMO within 45 days. The application filed with the OHMO must include a certification that the application has complied with this paragraph and must include the names and addresses of each person to whom the application was sent.

(b) Notwithstanding the provisions of paragraph (a) of this section, if the State or political subdivision determines that compliance with paragraph (a) of this section would be impracticable, the applicant shall:

(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and practicable to notify; and

(2) Include with the application filed with the OHMO a description of the persons or class or classes of persons to whom notice was not sent.

(c) The OHMO may require the State or political subdivision to provide notice

in addition to that required by paragraphs (a) and (b) of this section, or may determine that the notice required by paragraph (a) of this section is not impracticable, or that notice should be published in the FEDERAL REGISTER.

(d) The OHMO may serve notice on any other persons readily identifiable by the OHMO as persons who will be affected by the determination sought and may afford those persons an opportunity to file written comments on the application.

(e) Any person submitting written comments to the OHMO with respect to an application filed under this section shall send a copy of the comments to the applicant. The person shall certify to the OHMO that he has complied with the requirements of this paragraph. The OHMO may notify other persons participating in the proceeding of the comments and provide an opportunity for those other persons to respond.

§ 107.219 Processing.

(a) The Director, OHMO, may initiate an investigation of any statement in an application and utilize in his evaluation any relevant facts obtained by that investigation. The Director, OHMO, may solicit and accept submissions from third persons relevant to an application and will provide the applicant an opportunity to respond to all third person submissions. In evaluating an application, the Director, OHMO, on his own initiative may convene a hearing or conference, if he considers that a hearing or conference will advance his evaluation of the application.

(b) The Director, OHMO, may dismiss the application without prejudice if:

(1) He determines that there is insufficient information upon which to base a determination;

(2) Upon his request, additional information is not submitted by the applicant; or

(3) The applicant fails to provide the notice required by § 107.217.

(c) Except as provided in § 107.201(c), the Director, OHMO, will only consider an application for a non-preemption determination if—

(1) The applicant State or political subdivision expressly acknowledges in its application that the State or political subdivision requirement for which the determination is sought is inconsistent with the requirements of the Act or the regulations issued under the Act; or

(2) The State or political subdivision requirement has been determined by a court of competent jurisdiction or in a ruling issued under § 107.209 to be inconsistent with the requirements of the Act or the regulations issued under the Act.

(d) When the OHMO has received all substantive information it considers necessary to process an application for a non-preemption determination, it serves notice of that fact upon the applicant and all other persons who received notice of the proceeding pursuant to § 107.217.

(e) To the extent possible, each application for a non-preemption determination will be acted upon in a manner consistent with the disposition of previous applications for non-preemption determinations.

§ 107.221 Determination and order.

(a) Upon consideration of the application and other relevant information received or obtained during the proceeding, the Director, OHMO, issues an order setting forth his determination.

(b) The Director, OHMO, may issue a non-preemption order only if he finds that the State or political subdivision requirement affords to the public a level of safety at least equal to that afforded by the requirements of the Act and the regulations issued under the Act and does not unreasonably burden commerce. In determining whether the State or political subdivision requirement unreasonably burdens commerce, the Director, OHMO, considers the following factors:

(1) The extent to which increased costs and impairment of efficiency result from the State or political subdivision requirement.

(2) Whether the State or political subdivision requirement has a rational basis.

(3) Whether the State or political subdivision requirement achieves its stated purpose.

(4) Whether there is need for uniformity with regard to the subject concerned and if so, whether the State or political subdivision requirement competes or conflicts with those of other States and political subdivisions.

(c) The order includes a written statement setting forth the relevant facts and the legal basis for the determination. The order provides that any person aggrieved thereby may file an appeal with the Director, MTB.

(d) The OHMO serves a copy of the order upon the applicant, any other person who participated in the proceeding and upon any other person readily identifiable by the OHMO as one who is affected by the order. A copy of each order is placed on file in the public docket. The Director, OHMO, may publish the order or notice of the order in the FEDERAL REGISTER.

(e) An order issued under this section constitutes an administrative determination as to whether a particular requirement of a State or local subdivision of a State, which is inconsistent with the requirements of the Act or the regulations issued under the Act is not preempted.

§ 107.223 Timeliness.

If the OHMO fails to take action on the application within 90 days of serving the notice required by § 107.219(d), the applicant may treat the application as having been denied in all respects and may appeal therefrom as provided in § 107.225.

§ 107.225 Appeal.

Any person aggrieved by an order issued under § 107.221 may file an appeal with the Director, MTB. The appeal must be filed within 30 days of service of the order. There has not been an exhaustion of administrative remedies until an appeal has been filed and the appellate process is completed by the issuance of an order by the Director, MTB, granting or denying the appeal.

Subpart D—Enforcement

§ 107.301 Responsibility for enforcement.

In accordance with delegations of authority from the Secretary of Transportation set forth in Part 1 of this title,

responsibility for enforcement of this subchapter and Subchapter C of this chapter is exercised by:

(a) The Federal Aviation Administration with respect to the transportation or shipment of hazardous materials by aircraft;

(b) The United States Coast Guard with respect to the transportation or shipment of hazardous materials by vessels;

(c) The Federal Highway Administration with respect to the transportation or shipment of hazardous materials by highway vehicles;

(d) The Federal Railroad Administration with respect to the transportation or shipment of hazardous materials by railroad; and

(e) The MTB in all other respects. The MTB exercises this enforcement responsibility through the OHMO.

§ 107.303 Purpose and scope.

This subpart describes the various enforcement authorities exercised by the OHMO and the associated sanctions and prescribes the procedures governing the exercise of those authorities and the imposing of those sanctions.

§ 107.305 Investigations.

(a) *General.* The OHMO may initiate investigations relating to compliance by any person with any provision of this subchapter (or Subchapter C of this chapter), and order issued thereunder, or any court decree relating thereto. The OHMO encourages voluntary cooperation with its investigations. When circumstances warrant, however, subpoenas may be issued to compel the attendance of witnesses or the production of documents in accordance with and subject to § 107.13 and hearings may be conducted, and depositions taken pursuant to section 109(a) of the Act. The OHMO may conduct investigative conferences and hearings in the course of any investigation.

(b) *Investigators.* Investigations are conducted by officials of the OHMO who are duly designated for that purpose. Each official so designated may administer oaths and receive affirmations in any matter under investigation by the OHMO.

(c) *Notification.* Any person who is under investigation by the OHMO and who is requested to furnish information or documentary evidence is notified as to the general purpose for which the information or evidence is sought.

(d) *Termination.* When the facts disclosed by an investigation indicate that further action is unnecessary or unwarranted at that time, the investigative file is closed without prejudice to further investigation by the OHMO at any time that circumstances so warrant.

(e) *Confidentiality.* Information received in an investigation under this section, including the identity of the person investigated and any other person who provides information during the investigation, shall, unless otherwise determined by the OHMO, remain confidential under the investigatory file exception to the public disclosure requirements of 5 U.S.C. 552.

COMPLIANCE ORDERS

§ 107.307 Compliance orders generally.

When the OHMO has reason to believe that a person is engaging in conduct

which involves a violation of any provision of this subchapter or Subchapter C of this chapter for which the OHMO exercises enforcement responsibility, or of any exemption issued under Subpart B of this Part, and if time, the nature of the violation, and the public interest permit, the OHMO may conduct proceedings pursuant to section 109(a) of the Act to determine the nature and extent of the violation and may thereafter issue an order directing compliance.

§ 107.309 Notice of probable violation.

(a) The OHMO begins a compliance order proceeding by serving a notice of probable violation on a person charging him with violating one or more provisions of this subchapter.

(b) A notice of probable violation issued under this section includes:

(1) A statement of the provision[s] of this subchapter or Subchapter C of this chapter which the respondent is believed to be violating;

(2) A statement of the factual allegations upon which remedial action is being sought; and

(3) A statement of the remedial action being sought in the form of a proposed compliance order.

(c) The OHMO may amend a notice of probable violation issued under this section at any time before the entry of a final compliance order. If an amendment includes any new material allegation of fact or seeks new or additional remedial action, the respondent is given an opportunity to respond.

§ 107.311 Reply.

(a) Within 30 days of the service of a notice of probable violation issued under § 107.309, the respondent may file a reply with the OHMO official who issued the notice of probable violation. That official may extend the 30-day period for good cause shown.

(b) The reply must be in writing, signed by the person filing it, and state with respect to each factual allegation whether it is admitted or denied. Even though formally denied, a factual allegation set forth in a notice of probable violation is considered to be admitted for purposes of the proceeding unless:

(1) Opposed by the written statement of an individual having personal knowledge of the subject matter;

(2) Challenged as defective on its face together with a supporting explanation as to why it is believed to be defective; or

(3) Otherwise actively put at issue through the submission of relevant evidence.

(c) The reply must set forth any affirmative defenses and include a statement of the form and nature of proof by which those defenses are to be established.

(d) If it is necessary to respond to an amendment to the notice of probable violation, the respondent may amend his reply at any time before the issuance of an order under § 107.317.

(e) If the respondent elects not to contest one or more factual allegations, he

should so state in the reply. An election not to contest a factual allegation is admission of that allegation solely for the purpose of issuing a compliance order and constitutes a waiver of hearing as to that allegation but does not, by itself, constitute a waiver of the right to be heard on other issues. In connection with a statement of election not to contest a factual allegation, the respondent may propose an appropriate order for issuance by the Director, OHMO, or propose the negotiation of a consent order.

(f) Failure of the respondent to file a reply within the period provided constitutes a waiver of his right to appear and contest the allegation and authorizes the Director, OHMO, without further notice to the respondent, to find the facts to be as alleged in the notice of proposed violation and to issue an appropriate order directing compliance.

§ 107.313 Consent order.

(a) At any time before the issuance of an order under § 107.317, the OHMO and the respondent may execute an agreement for disposing of the case by the entry of a consent order. If the Director, OHMO, accepts the agreement, he issues an order in accordance with its terms. If the Director, OHMO, rejects the agreement, he directs that the proceeding continue.

(b) An agreement submitted to the Director, OHMO, under this section must include:

(1) A proposed compliance order suitable for the Director's signature;

(2) An admission of all jurisdictional facts;

(3) An express waiver of further procedural steps and of all right to seek judicial review or otherwise challenge or contest the validity of the order; and

(4) An acknowledgement that the notice of probable violation may be used to construe the terms of the order.

§ 107.315 Hearing.

(a) When a respondent files a reply contesting allegations in a notice of proposed violation issued under § 107.309 or when the OHMO and the respondent fail to agree upon an acceptable consent order, the Director, OHMO, or an official designated by him, convenes and presides over a hearing on the proposed compliance order.

(b) The presiding official may:

(1) Administer oaths and affirmations;

(2) Issue subpoenas as provided by § 107.13;

(3) Adopt procedures for the submission of evidence;

(4) Take or cause depositions to be taken;

(5) Rule on offers of proof and receive relevant evidence;

(6) Examine witnesses at the hearing;

(7) Convene, recess, reconvene, adjourn and otherwise regulate the course of the hearing;

(8) Hold conferences for settlement, simplification of the issues or any other proper purpose; and

(9) Take any other action authorized by or consistent with the provisions of this subpart pertaining to compliance orders and permitted by law which may expedite the hearing or aid in the disposition of an issue raised therein.

(c) The OHMO official who issued the notice of proposed violation, or his representative, has the burden of proving the facts alleged in the notice of proposed violation and may offer such relevant information as may be necessary to fully inform the presiding officer as to the matter concerned.

(d) The respondent may appear and be heard on his own behalf or through counsel of his choice. The respondent or his counsel may offer relevant information including testimony which he believes should be considered in defense of the allegations or which may bear on the remedial action being sought and conduct such cross-examination as may be required for a full disclosure of the facts.

§ 107.317 Presiding officer's decision.

(a) After consideration of evidence, the presiding officer may dismiss the notice of proposed violation or issue an order directing compliance. The order will include a statement of findings and conclusions as well as the reasons therefor on all material issues of fact, law, and discretion.

(b) A compliance order issued under this section is effective upon service on the respondent unless otherwise provided therein.

§ 107.319 Compliance order for immediate compliance.

(a) Notwithstanding §§ 107.309 through 107.317, the Director, OHMO, may issue a compliance order for immediate compliance, which is effective upon issuance, and until rescinded or suspended, if he finds

(1) There is strong probability that a violation is occurring or is about to occur;

(2) The violation poses an unreasonable risk to health or to safety of life or property; and

(3) The public interest requires the avoidance or amelioration of that unreasonable risk through immediate compliance and waiver of the procedures afforded under §§ 107.309 through 107.317.

(b) A compliance order for immediate compliance is served promptly upon the person against whom the order is issued by telex or telegram, with a copy served in the manner provided in § 107.11. The copy contains a written statement of the relevant facts and the legal basis for the order, including the findings required by paragraph (a) of this section.

(c) The Director, OHMO, may rescind or suspend a compliance order for immediate compliance if it appears that the criteria set forth in paragraph (a) of this section are no longer satisfied. When appropriate, however, such a suspension or rescission may be accompanied by a notice of probable violation issued under § 107.309.

(d) If at any time in the course of a proceeding commenced by a notice of probable violation the criteria set forth

in paragraph (a) of this section are satisfied, the Director, OHMO, may issue a compliance order for immediate compliance, even if the 30-day period for reply specified in § 107.311(a) has not expired.

(e) At any time after a compliance order for immediate compliance has become effective, the Director, MTB, or his delegate may request the Attorney General to bring an action for appropriate relief in accordance with § 107.331.

§ 107.321 Appeal.

(a) A respondent aggrieved by a compliance order or a compliance order for immediate compliance may file an appeal with the Director, MTB. The appeal must be filed within 20 days after service of the compliance order.

(b) The filing of an appeal does not stay the effectiveness of the order unless the Director, MTB, expressly so provides.

INJUNCTIVE ACTION

§ 107.331 Injunctions generally.

Whenever it appears to the OHMO that a person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any provision of this subchapter or Subchapter C of this chapter for which the OHMO exercises enforcement responsibility or of any order issued thereunder, the Director, MTB, or his delegate, may request the Attorney General to bring an action in the appropriate United States District Court for such relief as is necessary or appropriate, including mandatory or prohibitive injunctive relief, interim equitable relief, and punitive damages as provided by section 111(a) of the Act.

§ 107.333 Imminent hazards.

Whenever it appears to the OHMO that there is a substantial likelihood that death, serious illness, or severe personal injury will result from the transportation of a particular hazardous material before a compliance order proceeding or other administrative hearing or formal proceeding to abate the risk of that harm can be completed, the Director, MTB, or his delegate, may bring an action in the appropriate United States District Court for an order suspending or restricting the transportation of that hazardous material or for such other equitable relief as is necessary or appropriate to ameliorate the hazard as provided by section 111(b) of the Act.

CIVIL PENALTIES

§ 107.341 Civil penalties generally.

When the OHMO has reason to believe that a person has knowingly committed an act which is a violation of any provision of this subchapter or Subchapter C of this chapter for which the OHMO exercises enforcement responsibility or of any exemption issued under Subpart B of this part, it may conduct proceedings to assess and, if appropriate, compromise a civil penalty.

§ 107.343 Maximum penalties.

(a) A person who knowingly violates a requirement of this subchapter appli-

cable to the transporting of hazardous materials or to the causing of them to be transported or shipped is liable for a civil penalty of not more than \$10,000 for each violation. When the violation is a continuing one, each day of the violation constitutes a separate offense.

(b) A person who knowingly violates a requirement of this subchapter applicable to the manufacture, fabrication, marking, maintenance, reconditioning, repair, or testing of a package or container which is represented, marked, certified or sold by that person for use in the transportation of hazardous materials in commerce is liable for a civil penalty of not more than \$10,000.

§ 107.345 Notice of probable violation.

(a) The OHMO begins a civil penalty proceeding by serving a notice of probable violation on a person charging him with having violated one or more provisions of this subchapter or Subchapter C of this chapter.

(b) A notice of probable violation issued under this section includes:

(1) A statement of the provision(s) of this subchapter or Subchapter C of this chapter which the respondent is believed to have violated;

(2) A statement of the factual allegations upon which the proposed civil penalty is being sought;

(3) Notice of the maximum amount of civil penalty for which the respondent may be liable;

(4) Notice of the amount of the preliminary assessed civil penalty;

(5) A description of the manner in which the respondent should make payment of any money to the United States;

(6) A statement of the respondent's right to present written or oral explanations, information or any materials in answer to the allegations or in mitigation of the penalty; and

(7) A statement of the respondent's right to request a hearing and the procedures for requesting a hearing.

§ 107.347 Reply.

(a) Within 30 days of the service of a notice of probable violation issued under § 107.345, the respondent may:

(1) Pay the preliminary assessment as provided in § 107.349(a) and thereby close the case;

(2) Make an informal response as provided in § 107.351; or

(3) Request a hearing as provided in § 107.353.

(b) The OHMO official who issued the notice of probable violation may extend the 30-day period for good cause shown.

(c) Failure of the respondent to reply by taking one of the three actions described in paragraph (a) of this section within the period provided constitutes a waiver of his right to appear and contest the allegations and authorizes the Director, OHMO, without further notice to the respondent, to find the facts to be as alleged in the notice of probable violation and order the assessment of an appropriate civil penalty.

§ 107.349 Payment of penalty.

(a) Payment of a civil penalty should be made by certified check or money order payable to the Treasurer of the United States and sent to the Assistant General Counsel for Materials Transportation Law, Department of Transportation, Washington, D.C. 20590.

(b) At any time before an order assessing a civil penalty is referred to the Attorney General for collection, the respondent may offer to comprise for a specific amount by submitting a certified check or money order for that amount to the Assistant General Counsel who may accept or reject it. If it is accepted, the respondent is notified in writing that the acceptance is in full settlement of the civil penalty for the violation.

§ 107.351 Informal response and assessment.

(a) If a respondent elects to make an informal response to a notice of probable violation, he shall submit to the OHMO official who issued the notice such written explanations, information or other materials as he may desire in answer to the charges or in mitigation of the proposed penalty.

(b) The respondent may include in his informal written response a request for a conference. Upon receipt of such a request, the OHMO arranges for a conference as soon as practicable at a time and place of mutual convenience.

(c) Written explanations, information or material submitted by the respondent and relevant information presented during any conference held under this section are considered by the OHMO in reviewing the notice of proposed violation and determining the fact of violation and the amount of any penalty to be assessed.

(d) After consideration of an informal response, including any relevant information presented at a conference, the Director, OHMO, may dismiss the notice of probable violation in whole or in part. If he does not dismiss it in whole he may issue an order assessing a civil penalty.

§ 107.353 Request for hearing.

(a) If a respondent elects to request a hearing, he shall submit a written request to the Director, OHMO. The request must:

(1) State the name and address of the respondent and of the person signing the request if different from the respondent;

(2) State with respect to each allegation whether it is admitted or denied; and

(3) State with particularity the issues to be raised by the respondent at the hearing.

(b) After a request for hearing which complies with the requirements of paragraph (a) of this section, the Director, OHMO, schedules a hearing for the earliest practicable date.

(c) The Director, OHMO, may grant extensions of the time of the commencement of the hearing for good cause

shown.

§ 107.355 Hearing.

(a) When a hearing is requested and scheduled under § 107.353, the Director, OHMO, or an official designated by him, convenes and presides over the hearing. To the extent practicable, the hearing will be held in the general vicinity of the place where the alleged violation occurred or at a place convenient to the respondent. Testimony by witnesses shall be given under oath and the hearing shall be recorded verbatim.

(b) The presiding official may:

(1) Administer oaths and affirmations;

(2) Issue subpoenas as provided by § 107.13;

(3) Adopt procedures for the submission of evidence in written form;

(4) Take or cause depositions to be taken;

(5) Rule on offers of proof and receive relevant evidence;

(6) Examine witnesses at the hearing;

(7) Convene, recess, reconvene, adjourn and otherwise regulate the course of the hearing;

(8) Hold conferences for settlement, simplification of the issues or any other proper purpose; and

(9) Take any other action authorized by or consistent with the provisions of this subpart pertaining to civil penalties and permitted by law which may expedite the hearing or aid in the disposition of an issue raised therein.

(c) The OHMO official who issued the notice of proposed violation, or his representative, has the burden of providing the facts alleged in the notice of proposed violation and may offer such relevant information as may be necessary to fully inform the presiding officer as to the matter concerned.

(d) The respondent may appear and be heard on his own behalf or through counsel of his choice. The respondent or his counsel may offer relevant information including testimony which he believes should be considered in defense of the allegations or which may bear on the penalty to be assessed and conduct such cross-examination as may be required for a full disclosure of the facts.

§ 107.357 Presiding officer's decision.

(a) After consideration of the evidence of record, the presiding officer may dismiss the notice of probable violation in whole or in part. If he does not dismiss it in whole, he will issue and serve on the respondent an order assessing a civil penalty. The order will include a statement of findings and conclusions as well as the reasons therefor on all material issues of fact, law, and discretion.

(b) If, within 20 days after service of an order assessing a civil penalty, the respondent does not pay the civil penalty or file an appeal as provided in § 107.361

(a), the case may be referred to the Attorney General with a request that action to collect the penalty be brought in the appropriate United States District Court.

§ 107.359 Assessment considerations.

In assessing a civil penalty under §§ 107.351 and 107.355, the assessment is made only after considering:

(1) The nature and circumstances of the violation;

(2) The extent and gravity of the violation;

(3) The degree of the respondent's culpability;

(4) The respondent's history of prior offenses;

(5) The respondent's ability to pay;

(6) The effect on the respondent's ability to continue in business; and

(7) Such other matters as justice may require.

§ 107.361 Appeal.

(a) A respondent aggrieved by a presiding officer's decision and order issued under § 107.357 assessing a civil penalty may file an appeal with the Director, MTB. The appeal must be filed within 20 days of service of the presiding officer's order.

(b) If the Director, MTB, affirms the assessment and the respondent does not pay the civil penalty within 20 days after service of the Director's decision on appeal, the case may be referred to the Attorney General with a request that action to collect the penalty be brought in the appropriate United States District Court.

CRIMINAL PENALTIES

§ 107.371 Criminal penalties generally.

Section 110(b) of the Act (49 U.S.C. 1809(b)) provides a criminal penalty of a fine of not more than \$25,000 and imprisonment for not more than five years, or both, for any person who willfully violates a provision of the Act or a regulation issued under the Act.

§ 107.373 Referral for prosecution.

If an inspector or other employee of the OHMO becomes aware of a possible willful violation of the Act, this subchapter or Subchapter C of this chapter for which the OHMO exercises enforcement responsibility, he reports it to the Office of the Assistant General Counsel for Materials Transportation Law. If appropriate, the Assistant General Counsel refers the report to the Department of Justice for criminal prosecution of the offender.

Effective date: This amendment is effective on January 3, 1977.

(49 U.S.C. 1808-1811 and 49 CFR 1.53 (e).)

Issued in Washington, D.C., on August 31, 1976.

JAMES T. CURTIS, Jr.,
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[FR Doc 76-26375 Filed 9-8-76; 8:45 am]